Supreme Court, U.S.
FILED

001791 JAN 24 2008

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No.

IN THE

Supreme Court of the United States

DAN C. FORE,
Petitioner
v.
EDWIN A. HADSELL and
MONTA GAE HADSELL

On Petition for Writ Of Certiorari
To The Arizona Court of Appeals, Division One

PETITION FOR WRIT OF CERTIORARI

Dan C. Fore
In Propria Persona
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20 PP

Questions Presented for Review

This Petition is based upon the dismissal of the Petitioner's case on Summary Judgment in contradiction of Arizona State statutes, Rules of Court, and Constitutional law. The questions presented are as follows:

1. Did the Arizona Superior Court violate the Constitutional rights of Petitioner to due process and equal protection under the law by denying him the right to give testimony and present evidence before a jury prior to granting summary judgment?

2. Did the Arizona Court of Appeals, Division One violate the Constitutional rights of Petitioner to due process and equal protection under the law when it affirmed the lower court's summary judgment without allowing Petitioner to present testimony or witnesses?

3. Is an award of Summary Judgment constitutional when discovery, including testimony of witnesses and presentation of evidence, has been denied by the court?

List of Parties

Petitioner:	Dan C. Fore
Respondents:	Edwin A. Hadsel Monta Gae Hadsell
Third Party Defendant:	Deanna L. Fore

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Table of Cited Authorities

Otteson v. United States, 622 F.2d 516

Orme School v. Reeves, 166 Ariz. 301, 308, 802 P.2d 1000 (1990)

Article 2, Section 1, Arizona State Constitution

Article 2, Section 4, Arizona State Constitution

Article 2, Section 23, Arizona State Constitution

Article 7, United States Constitution

Article 14, United States Constitution

Ft. Mohave Farms Inc., vs. Dunlap, 63 S.Ct. 1096

Anderson 477 U.S. at 255, 106 S. Ct. at 2513

Cox v. English American Underwriters, 245 F.2d 330-33 (9th Cir)

172 Ariz. 126, Lani v. Arkules, 835 P.2d 458

Murdock-Bruant Construction, Inc. v. Taylor Pearson, 146 Ariz. 57-60

149 Ariz. Blue Ridge Sewer Im. District v. Lowery and Associates, Inc.

Arizona Rules of Civil Procedure Rules 38 & 56

Citations of Reports

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the Arizona Supreme Court appears at Appendix B to the petition and is unpublished.

Statement of Basis for Jurisdiction

The date on which the highest state court decided this case was May 9, 2000. A copy of that decision appears at Appendix "A".

A timely petition for rehearing was thereafter denied on the following date: October 26, 2000, and a copy of the order denying rehearing appears at Appendix "B".

An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

1. Arizona State Constitution, Article 2, Section 1 ... The State of Arizona holds the United States Constitution as the highest in the land.

2. Arizona State Constitution, Article 2, Section 23 ... The right to a jury trial is inviolate.

3. Arizona State Constitution, Article 3, Section 4 ... Each person is guaranteed due process and equal protection under the law.

4. United States Constitution, Article 7 ... Right to a jury trial.

5. United States Constitution, Article 14 ... Due process and equal protection under the law.

Statement of the Case

The Petitioner purchased the rights to a lawsuit on a fifty percent (50%) basic from a drywall and stucco contractor, Western Drywall, which was owed in excess of $30,000.00 by the respondents for work completed on their home. Primarily due to this loss, Western Drywall was forced to file bankruptcy. The Federal bankruptcy court approved this lawsuit purchase by the Petitioner. The respondent negligently gave almost $200,000.00 in advance to Design 201 corporation to build their home. The contractor became insolvent, and the homeowners, in order to induce Western Drywall to finish the home, orally promised Western Drywall's principal, namely Glen Burnham, that they would pay him for his work.

At a hearing in Superior Court, Glen Burnham appeared to provide testimony concerning these facts, but Judge Robert Brutinel refused to allow him to give any testimony whatsoever. The Petitioner was to give one-half of any recovery from the litigation to the bankruptcy estate of Western Drywall.

Furthermore, Judge Robert Brutinel barred the presentation of all testimony and evidence and ruled in a manner that is contrary to the Arizona State Constitution, established Arizona case law, the Arizona Rules of Civil Procedure and the United States Constitution. He granted Summary Judgment without a trial, blatantly ignoring scores of material issues of fact under the doctrine of Quantum Meruit and other legal theories.

Argument

Every American citizen should have the right to present testimony and evidence to a jury without having a judge decide whether the citizen has a right to a jury trial. In this particular case, the Judge refused to hear testimony when a major witness in the case came to his chambers to testify regarding relevant facts. Not only did he refuse to allow testimony to be presented, he refused to allow any evidence of any kind whatsoever to be presented, and he held the matter in chambers and absent the unbiased judicial forum of an open courtroom. Petitioner argues that a Judge should not and does not have the authority to ignore and vitiate the rights of the Petitioner and rule against him on the basis that summary judgment is appropriate, when the evidence and testimony to controvert the motion for summary judgment is suppressed.

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Appendix A	Arizona Court of Appeals Memorandum Decision
Appendix B	Arizona Court of Appeals Mandate
Appendix C	Arizona Supreme Court Order

Appendix A

[DIVISION 1
COURT OF APPEALS
IN THE COURT OF APPEALS
STATE OF ARIZONA
FILED MAY - 9 2000
GLEN D. CLARK, CLERK
By s/K. Scott]

STATE OF ARIZONA
DIVISION ONE

DAN C. FORE and DEANNA L. FORE,

Plaintiff and Third Party Defendants-Appellants,

v.

EDWIN A. HADSELL and MONTA GAE HADSELL,

Defendants and Third Party Plaintiffs-Appellees.

1 CA-CV 99-0594
DEPARTMENT D

MEMORANDUM DECISION
(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County
Cause No. CV 97-0582

The Honorable Robert M. Brutinel, Judge

AFFIRMED

Dan C. Fore and Deanna L. Fore — Mesa
In Propria Persona
Third Party Defendants-Appellants

Daniel F. Furlong — Prescott
Attorney for Plaintiffs-Appellees

L A N K F O R D, Presiding Judge

¶1 Dan C. Fore and Deanna L. Fore appeal the trial court's grant of summary judgment, denying their claims against Edwin A. Hadsell and Monta Gae Hadsell and awarding attorney's fees to the Hadsells. For the reasons stated below, we affirm.

¶2 We begin with a summary of the facts. The Hadsells contracted with Design 201, Inc. ("Design 201") to build their personal residence. They made an initial payment of $26,997. The Hadsells later agreed to some additional work, bringing the total cost for construction of the house to $206,713. Although the construction contract called for progress payments to be made as various phases of the work were completed, the Hadsells paid the entire balance. In a signed document, Design 201 acknowledged receipt of the payment and its obligation to pay for the construction from those funds.

¶3 Thereafter, Design 201 subcontracted with Western Dry Wall Corporation ("Western") to perform the dry wall and stucco work on the Hadsell home. Western's contract for the work was solely with Design 201and not with the Hadsells. Western completed the dry wall and stucco work at the house, but was never paid for its services.

¶4 Design 201 disappeared with the Hadsells' money, failing to pay Western for its work and leaving the construction project unfinished. In addition to paying the full contract price to Design 201, the Hadsells spent an additional $60,000 more to finish the house.

¶5 Western filed a mechanic's and materialman's lien on the property. It later released the lien when the Hadsells' attorney pointed out in a letter that the lien was not allowed under Arizona's lien laws because Western did not have a written contract directly with the Hadsells. See Ariz. Rev. Stat. Ann. ("A.R.S.") § 33-1002(B) (2000).[1] Western did not pursue any claims against the Hadsells.

¶6 Dan C. Fore subsequently filed suit *in propria persona* against the Hadsells, seeking to recover the value of the work Western had performed on their property. He alleged that Western had assigned to him the right to pursue Western's claims against the Hadsells. He

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[1] A.R.S. section 33-1002(B) provides:

No lien provided for in this article shall be allowed or recorded by the person claiming a lien against the dwelling of a person who became an owner-occupant prior to the construction, alteration, repair or improvement, except by a person having executed in writing a contract directly with the owner-occupant.

argued that the Hadsells should be required to pay for Western's work under a quantum meruit and unjust enrichment theory.

¶7 The Hadsells' attorney wrote a letter to Fore. The attorney stated that the suit was not justified under the relevant law and the facts and that he would subject Fore and his wife to sanctions if Fore refused to dismiss the suit. Because Fore refused to dismiss the suit, the Hadsells filed a third party complaint to bring Fore's wife into the suit for the purpose of obtaining an attorney's fee judgment that would bind the marital community. The Hadsells then moved for summary judgment, also requesting an award of attorney's fees for Fore's filing of an unjustified lawsuit against them.

¶8 The trial court granted the Hadsells' motion for summary judgment and granted the request for attorney's fees against the Fores' marital community in the amount of $2,646.56. After entry of formal judgment, the Fores filed an appeal in this Court.

¶9 On appeal from summary judgment, we view the evidence in the light most favorable to the non-moving party and determine de novo whether any genuine issues of material fact exist and whether the trial court erroneously applied the law. See *Gonzales v. Satrustegui*, 178 Ariz. 92, 97, 870 P.2d 1188, 1193 (App. 1993). Here, the following undisputed material facts were presented to the trial court: (1) Western bestowed a benefit to the Hadsells by completing the dry wall and stucco work for their house; (2) Western was never paid for the benefit it bestowed upon the Hadsells; and (3) the Hadsells had paid for the dry wall and stucco work because their payment to Design 201 had been for the full cost of the construction of their

house.

¶10 We reject the Fores' argument that the Hadsells should be liable in quantum meruit. Quantum meruit is an equitable remedy based upon the premise that one who benefits from the labor and materials supplied by another should not be unjustly enriched. See *Stapley v. American Bathtub Liners, Inc.*, 162 Ariz. 564, 568, 785 P.2d 84, 88 (App. 1989); *City of Sierra Vista v. Cochise Enters., Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984). The remedy is available only where both a benefit has been bestowed and the party receiving the benefit has been unjustly enriched. *See, e.g., A M Leasing, Ltd. v. Baker*, 163 Ariz. 194, 198, 786 P.2d 1045, 1049 (App. 1989). As explained in *A M Leasing*:

> The cases are of two types: one in which the defendant paid no one for the benefits received; the other in which the defendant paid in full, but paid someone to whom he was contractually liable for payment rather than the plaintiff, who actually provided the materials or services. The plaintiff prevails only in the first group of cases, for only in those may it fairly be said that the defendant has been unjustly enriched.

Id. Although the Hadsells would have been unjustly enriched if they had paid no one for the labor and materials Western supplied, that is not the case. Their payment to Design 201 included the dry wall and stucco work. The trial court did not err in determining that a quantum meruit recovery was not available under the facts presented.

¶11 We also reject the Fores' argument that they had presented a sufficient claim of negligence to the trial court. Their claim rests on a theory that the Hadsells were negligent in paying the full contract price to the contractor at an early stage instead of making partial payments as the work progressed. As a matter of law, the Fores failed to establish their claim. A negligence action may be maintained only if there is a duty or obligation, recognized by law, which requires the defendant to conform to a particular standard of care in order to protect others against unreasonable risk of harm. See Markowitz v. Arizona Parks Bd., 146 Ariz. 352, 356, 706 P.2d 364, 368 (1985). The question of duty is decided by the court. *See id.*

¶12 Here, the law does not recognize any duty from the Hadsells to Western. Western was a subcontractor. Design 201 was a general contractor. Western was hired by Design 201 and had no relationship with the Hadsells. Moreover, the language of A.R.S. section 33-1002(B) and (C) protects owner-occupants of residential dwellings and not subcontractors in determining who should bear the loss when a contractor has not paid the subcontractor. The burden rests on the subcontractor to protect itself in its dealings with the contractor. To recognize a claim for negligence in such instances would defeat the purpose of this statue.

¶13 We also reject the Fores' argument that material issues of fact precluded entry of summary judgment. When a party moving for summary judgment presents sworn proof of specific facts showing it is entitled to judgment, the adverse party must respond with sworn proof of specific facts showing a genuine issue of fact for trial. *See Portonova v. Wilkinson*, 128 Ariz. 501,

502, 627 P.2d 232, 233 (1981). In this case, the Fores did not present evidence to the trial court to counter the evidence presented by the Hadsells in the affidavit and exhibits attached to their motion for summary judgment. At the oral argument on the motion, the Fores argued that if they were allowed to go to jury, they would present evidence that would support their claims. Because the Fores failed to demonstrate that a genuine issue of material fact existed, the motion was properly granted.

¶14 Finally, we reject the Fores' contention that the trial court denied them speedy justice by failing and refusing to sign an order of summary judgment. Our review of the record suggests that the Fores were responsible for most of the delay. In granting summary judgment, the trial court ruled that the Hadsells were entitled to attorney's fees and directed them to file appropriate affidavits with the court to allow the amount of the fees to be determined. It was not improper for the trial court to wait until the amount of attorney's fees had been determined before entering the formal judgment. During this intervening period, the Fores took numerous steps which delayed the trial court in determining the fees and consequently in signing a formal judgment. For example, the Fores requested a ruling on a motion for relief from judgment, attempted a premature appeal, moved to disqualify the trial judge, and opposed a hearing on the motion to determine the amount of fees to be awarded.

¶15 We award attorney's fees to the Hadsells pursuant to A.R.S. section 12-341.01(A) (Supp. 1999) because this matter is alleged to have arisen out of a contract. We also award attorney's fees to the Hadsells as sanctions

pursuant to Rule 11.

Appendix B

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAN C. FORE and DEANNA L. FORE Plaintiffs, Third Party Defendants-Appellants, v. EDWIN A. HADSELL and MONTA GAE HADSELL, Defendants, Third Party Plaintiffs-Appellees.	)

1 CA-CV 99-0594

DEPARTMENT D

MANDATE

TO: The Honorable Superior Court for YAVAPAI County, Arizona in relation to Cause No. CV 97-0582.

GREETING: The above cause was presented to your Court and was brought before Division One of the Court of Appeals of the State of Arizona in the manner prescribed by law. This

Court rendered its memorandum decision and caused the same to be filed on May 9, 2000.

The motion for reconsideration was denied and notice thereof was given on May 23, 2000. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated October 26, 2000, the Arizona Supreme Court denied the petition for review, Supreme Court No. CV-00-0120-PR.

NOW THEREFORE, YOU ARE COMMANDED that such proceedings be had in said cause as shall be required to comply with the decision of this Court, a copy of the memorandum decision being attached hereto.

WITNESS, THE HONORABLE JEFFERSON L. LANKFORD, Presiding Judge, Department D, Division One of the Court of Appeals of the State of Arizona on November 16, 2000.

(SEAL)

GLEN D. CLARK, CLERK
By
s/ [illegible signature]
Deputy Clerk

Appendix C

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Arizona Bar #7109
Attorney for Defendants-Hadsell

[Jan 12 2001
Filed 1 O'Clock p.m.
Jan 11 2001
Norbert G. Wedepohl, Clerk
By Angela Kinkead
Deputy]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

DAN C. FORE,

Plaintiff,

vs.

DESIGN 201, INC., a revoked Arizona corporation, RICHARD A. PEEL and JUDY L. PEEL, husband and wife, share-holders and corporate officers of DESIGN 201, INC., RAY A. GARRIS and JANE DOE GARRIS, husband and wife,

and shareholders/officers of DESIGN 201, INC., EDWIN A. HADSELL and MONTA GAE HADSELL, husband and wife, ROBERT C. APODACA and KATHERINE K. APODACA, husband and wife,	)
Defendants.	)
EDWIN A. HADSELL and MONTA GAE HADSELL, Third Party Plaintiffs,	)
vs.	)
JANE DOE FORE, Third Party Defendant.	)

On September 1, 1999 this Court entered its original judgment awarding Edwin A. Hadsell and Monta Gae Hadsell Judgment against Dan C. Fore and Deanna L. Fore, for attorney's fees in the amount in the amount [sic] of $1,555.03 for attorney's fees and costs incurred by defendants on appeal.

This Court originally entered judgment against the Fores in the Trial Court in the amount of $2,646.56 for attorney's fees and for costs of suit in the amount of $118.50. The Fores filed an Appeal to the Arizona Court of Appeals, which affirmed the Judgment of this Court. The Fores filed a Petition for Review, but it was denied by the Arizona Supreme Court. On November 16, 2000 the Arizona Court of Appeals transmitted its Mandate to this Court, awarding the Hadsells' attorney's fees on Appeal in the amount of $1,447.03 and costs on Appeal

in the amount of $108.00 for a total of $1,555.03.

In accordance with the Opinion and Mandate of the Court of Appeals, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Edwin A. Hadsell and Monta Gae Hadsell are hereby awarded Judgment against the marital community of Dan C. Fore and Deanne L. Fore, and each of them, jointly and severally, in the amount of $1,555.03, together with interest at the legal rate from the date of this Judgment until paid.

IT IS FURTHER ORDERED that the Clerk of the Yavapai County Superior Court shall immediately pay to Daniel F. Furlong, attorney for the Hadsells, the $250.00 cost bond posted by the Fores, which the Clerk of this Court is holding for attorney's fees and costs incurred by defendants on appeal.

DATED this 10 day of January, 2001.

s/ Robert Brutinel
Hon. Robert M. Brutinel
JUDGE OF THE SUPERIOR COURT

A copy of the foregoing
mailed this 27th day of
December, 2000, to:
Dan C. Fore and Deanna L. Fore
745 W. Baseline Rd., Ste. 22
Mesa, Arizona 85201

by /s [illegible signature]

Appendix C

[SEAL]
SUPREME COURT
STATE OF ARIZONA
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TELEPHONE: (602) 542-9396

NOEL K. DESSENT
CLERK OF THE COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

October 26, 2000

RE: DAN C. FORE et ux v EDWIN A HADSELL/MONTA HADSELL
Arizona Supreme Court No. CV-00-0210-PR
Court of Appeals Division One No. 1 CA-CV 99-0594
Yavapai County Superior Court No. CV 97-0582

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 26, 2000, in regard to the above-referenced cause:

ORDERED: Motion to Accept Filing of Petition for Review as Being Timely = GRANTED.

FURTHER ORDERED: Appellants' Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellees Hadsell] = GRANTED.

A panel composed of Vice Chief Justice Jones, Justice Martone and Justice McGregor participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of October, 2000.

Noel K. Dessaint, Clerk

TO:

Dan C. Fore
Deanna L. Fore
Daniel F. Furlong
Glen D. Clark, Clerk, Court of Appeals Division One, Phoenix
Lexis-Nexis
West Publishing Company

dmc